

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LYLE G. SMITHINGELL,

Plaintiff,

CASE NO. C16-5981-MAT

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff Lyle Smithingell proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1962.¹ He has a high school degree and a carpenter's certificate, and previously worked as a carpenter. (AR 25, 39.)

¹ Plaintiff's date of birth is redacted back to the year in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files.

1 Plaintiff filed DIB and SSI applications in June 2013, alleging disability beginning
2 September 20, 1996. (AR 206, 208.) Plaintiff remained insured for DIB through December 31,
3 2008 and was required to establish disability on or prior to that “date last insured” (DLI). *See* 20
4 C.F.R. §§ 404.131, 404.321. His applications were denied initially and on reconsideration.

5 On February 5, 2015, ALJ Cynthia Rosa held a hearing, taking testimony from plaintiff
6 and a vocational expert (VE). (AR 33-65.) At hearing, plaintiff amended his alleged onset date
7 to December 31, 2007. (AR 37.) On May 20, 2015, the ALJ issued a decision finding plaintiff
8 not disabled. (AR 14-27.)

9 Plaintiff timely appealed. The Appeals Council denied plaintiff’s request for review on
10 September 27, 2016 (AR 1-5), making the ALJ’s decision the final decision of the Commissioner.
11 Plaintiff appealed this final decision of the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
18 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
19 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff’s status
20 post three surgeries for right scapholunate ligament tear severe. She found other impairments,
21 including major depressive disorder and anxiety disorder (not otherwise specified (NOS)),
22 nonsevere. Step three asks whether a claimant’s impairments meet or equal a listed impairment.
23 The ALJ found the impairments did not meet or equal the criteria of a listing.

1 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
2 residual functional capacity (RFC) and determine at step four whether the claimant has
3 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
4 light work and able to lift/carry five pounds occasionally and frequently with right upper extremity,
5 but with no exertional limitations in lifting/carrying with left upper extremity; able to perform
6 work that does not require crawling or climbing ladders, ropes, or scaffolds; can do occasional
7 handling and fingering with right upper extremity; claimant is right hand dominant and able to
8 perform work that does not require using hand controls with right upper extremity; and able to
9 perform work that allows him to avoid concentrated exposure to vibrations and hazards. With that
10 assessment, the ALJ found plaintiff unable to perform his past relevant work.

11 If a claimant demonstrates an inability to perform past relevant work, or has no past
12 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
13 retains the capacity to make an adjustment to work that exists in significant levels in the national
14 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,
15 such as work as a cashier II, furniture rental consultant, and information clerk.

16 This Court's review of the ALJ's decision is limited to whether the decision is in
17 accordance with the law and the findings supported by substantial evidence in the record as a
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
19 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
20 by substantial evidence in the administrative record or is based on legal error.") Substantial
21 evidence means more than a scintilla, but less than a preponderance; it means such relevant
22 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
23 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of

1 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
2 F.3d 947, 954 (9th Cir. 2002).

3 Plaintiff avers the ALJ erred in failing to find a severe mental impairment and, in so doing,
4 erred in rejecting the medical opinions of record. He requests remand for further administrative
5 proceedings. The Commissioner argues the ALJ's decision has the support of substantial evidence
6 and should be affirmed.

7 Step Two

8 At step two, a claimant must make a threshold showing that his medically determinable
9 impairments significantly limit his ability to perform basic work activities. *See Bowen v. Yuckert*,
10 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers
11 to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b).
12 "An impairment or combination of impairments can be found 'not severe' only if the evidence
13 establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability
14 to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling
15 (SSR) 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless
16 claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the
17 "combined effect" of an individual's impairments in considering severity. *Id.* A diagnosis alone
18 is not sufficient to establish a severe impairment. Instead, a claimant must show his medically
19 determinable impairments are severe. 20 C.F.R. §§ 404.1520(c), 416.920(c).

20 The ALJ concluded plaintiff's medically determinable mental impairments of major
21 depressive disorder and anxiety disorder (NOS), considered singly or in combination, did not cause
22 more than minimal limitations in his ability to perform basic mental work activities. (AR 17.) The
23 ALJ pointed to a March 2011 treatment note, from primary care provider Dr. William Roes,

1 stating: "After a hiatus of seven years [the claimant] comes back for depression." (AR 17 (quoting
2 368).) The ALJ stated: "Dr. Roes noted that the claimant reported that he was feeling depressed,
3 unmotivated, and having problems with concentration in the context of not being able to get
4 employment." (*Id.*) She described progress notes as showing plaintiff responded well to treatment
5 with medication (citing AR 357-490), other treatment notes showing plaintiff had not reported any
6 psychological symptoms and generally presented with normal mood and affect (citing AR 521,
7 525-26), and a January 2015 treatment note from Dr. Zhiqian Wang in which plaintiff denied a
8 history of severe depression (citing AR 565). The ALJ cited to the same treatment notes at step
9 four, and concluded plaintiff's depression was generally well treated and that medication had
10 worked with good success. (AR 22.)

11 The ALJ's decision does not reflect sufficient consideration of the medical evidence
12 associated with plaintiff's mental impairments. The record shows Dr. Roes misstated the length
13 of time plaintiff went without treatment for depression. While plaintiff had been previously treated
14 for depression and other symptoms in 2002 through 2004, he also received such treatment from
15 Dr. Roes and others in 2007 and 2008. (*See* AR 371-72, AR 376-80, 387-88).)² Nor is it clear Dr.
16 Roes associated plaintiff's reports of a lack motivation, depression, and lack of concentration
17 within the context of his inability to find employment, as opposed to considering all of those factors
18 as pertinent to his depression: "He has not been able to get employment. He is terribly
19 unmotivated. He feels depressed. He has problems with concentration. He has appetite issues
20

21 ² Plaintiff clarifies that Dr. Roes treated him with Amitriptyline in 2011, not Zoloft, as the ALJ
22 appeared to indicate. (*See* AR 17.) The medical records cited by the ALJ show plaintiff used Zoloft in
23 2002 to 2004, Effexor in 2007 and 2008, and Amitriptyline beginning in 2011. (*See* AR 367-82, 387, 406-
14, 430-35.) Plaintiff had also, in November 2002, reported a history of depression dating back to 1996.
(AR 428-29 ("He notes [depression] has really been a persistent issue since 1996 with a sense of depression,
decreased motivation, increased fatigue, decreased concentration, decreased memory, marked increase in
anger, no tearfulness, and no suicidal ideologies. . . [H]e would like to get on a new medication for this."))

1 and has gained significant weight.” (AR 368.)

2 The progress notes do show plaintiff responded well to treatment with medication. (See
3 AR 379-80, 381-82, 406-09, 428-29, 431-33, 435 (good results, progressing well, doing quite well
4 and much better with the use of medication); AR 371-72 (medication controlling irritability); AR
5 377-38 (doing much better with motivation and energy; wife noted significant improvement in
6 irritability); and 376-77 (depression starting to control).) However, plaintiff also reported he
7 lacked insurance or other means to obtain treatment. (AR 40, 44 (plaintiff testified at 2015 hearing
8 that he had only recently obtained medical insurance and went without medical coverage “a whole
9 lot of time”); AR 257 (August 2013: no insurance to see a doctor); AR 497 (September 2013: no
10 medications because “no money or insurance”).) The ALJ discounted these reports by noting
11 plaintiff occasionally called in to Dr. Roes to receive guidance or get information, and by pointing
12 to plaintiff’s failure to pursue low or no cost conservative treatment measures suggested by a
13 physician. (AR 22.) The low cost measures related to treatment for physical impairments and
14 pain, not mental impairments. (*Id.* (citing AR 566).) The fact plaintiff sought guidance and
15 information from Dr. Roes refutes the perception he did not pursue treatment and does not show
16 he was able to obtain medication. The ALJ did not, as such, sufficiently address the evidence
17 associated with plaintiff’s failure to treat his mental impairments. *See* SSR 82-59 (failure to follow
18 prescribed treatment may be justifiable where claimant unable to afford); SSR 96-7p (ALJ should
19 not draw inferences from failure to seek or pursue treatment without first considering explanations
20 for that failure, including an inability to afford treatment).

21 In addition, the progress and treatment notes cited by the ALJ do not persuasively support
22 the non-severity finding. The ALJ cites to multiple notes from a single May 2014 procedure on
23 plaintiff’s wrist as showing his failure to report psychological symptoms and presentation with

1 normal mood and affect. (See AR 521, 524, 526.) The January 2015 treatment note similarly
2 relates to plaintiff's physical impairments. (See AR 564-66.)

3 The ALJ also, in considering mental impairments, found plaintiff had no more than mild
4 limitations in activities of daily living, social functioning, and concentration, persistence, or pace,
5 and no episodes of decompensation. (AR 17-18.)³ She construed functional reports completed by
6 plaintiff and his wife to show his activities of daily living are primarily compromised by physical
7 pain and not mental impairments, and pointed to another report that plaintiff goes grocery shopping
8 when his wife wants him to go and does light cleaning "here and there", but "does not do much
9 because, 'I don't know, most of the time, I don't even think about it.'" (AR 18 (citing AR 250-
10 60, 268-77, 500).) The ALJ noted plaintiff's report he spends time with family on a daily basis,
11 but does not go anywhere on a daily basis, and contrasted reports about his social functioning with
12 medical records reflecting his presentation as pleasant and cooperative. (AR 18 (citing AR 254-
13 55, 272-73 and AR 492, 521, 526, 563).) The ALJ stated plaintiff generally attributed problems
14 with concentration, persistence, and pace to his pain symptoms and not necessarily his mental
15 impairments. Plaintiff also reported he was able to watch television without difficulty, read news
16 online, and "find his way around" the computer and, in a mental status examination (MSE),
17 successfully completed serial sevens, followed a three-step command with mild hesitation, and
18 spelled "world" backward with one mistake. (AR 18 (citing AR 500-01).)

19 It is not clear plaintiff's wife attributed his difficulties primarily to physical impairments.
20

21 ³ Upon identification of a colorable claim of mental impairment, an ALJ must apply a "special
22 technique[.]" 20 C.F.R. §§ 404.1520a(a), 416.920a(a); *Keyser v. Comm'r, Soc. Sec. Admin.*, 648 F.3d 721,
23 725-26 (9th Cir. 2011). Specifically, an ALJ's decision must include a specific finding as to the degree of
mental limitation in each of four broad functional areas, including: activities of daily living; social
functioning; concentration, persistence and pace; and episodes of decompensation. 20 C.F.R. §§
404.1520a(c), (e); 416.920a(c), (e). *But see* 20 C.F.R. Pt. 404, Subpt. P., App. 1, 12.00 (A)(2)(b)
(modifications to criteria effective January 2017).

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1 She stated plaintiff “mentally . . . crashed” after his injury, is “always angry, depressed and
2 paranoid”, and is “in constant pain and has trouble sleeping concentrating and completing tasks . .
3 .tires easily and isn’t interested in anything.” (AR 257.) She stated plaintiff suffers from depression
4 and paranoia, thinks everyone is against him, and is always angry, offensive and rude; cannot get
5 along with others due to anger and paranoia; no longer gets enjoyment from anything; that his
6 constant pain makes him angry, tired, miserable; and is “mentally unstable.” (AR 273-75.) The
7 ALJ also failed to describe a number of notable aspects of plaintiff’s presentation on MSE. (AR
8 499-500 (plaintiff on verge of tears throughout interview, polite, but angry and irritable, blunted
9 prosody, perseverative thought processes, limited recall for exact dates and details, somewhat
10 distractible and requiring repetition of words and questions, affect irritable, angry, resentful, and
11 dysphoric, and could not remember any of three objects after five minutes).) (See also AR 492
12 (describing plaintiff as cooperative, but also somewhat agitated and his wife as claiming “he does
13 have anger management issues at times”).)

14 The Court, in sum, concludes the ALJ erred in considering the severity of plaintiff’s mental
15 impairments. These errors undermine the substantial evidence support for the ALJ’s conclusions
16 at step two and beyond.

17 Medical Opinions

18 An ALJ, as a general matter, gives more weight to the opinion of a treating physician than
19 to a non-treating physician, and more weight to the opinion of an examining physician than to a
20 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
21 contradicted by another physician, a treating or examining physician’s opinion may be rejected
22 only for ““clear and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396
23 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may not be

1 rejected without “‘specific and legitimate reasons’ supported by substantial evidence in the record
2 for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Non-
3 examining State agency medical and psychological consultants are highly qualified and experts in
4 the evaluation of Social Security disability claims and, while not binding, their opinions must be
5 considered. 20 C.F.R. §§ 404.1527(e)(2)(i), 416.927(e)(2), 404.1513a, 416.913a; SSR 96-6p.

6 In September 2013, consultative psychiatric examiner Dr. Mary Lemberg opined plaintiff
7 could manage his funds; had the ability to perform simple and repetitive tasks, but would have
8 more difficulty completing detailed and complex tasks, mostly due to short-term memory
9 difficulties, and would have occasional difficulty adapting to new environments; may have
10 difficulty attending to instructions from supervisors and would have some difficulty interacting
11 with co-workers and the public; his depression and prominent irritability and anger would limit
12 productivity (due to low motivation) and interpersonal interactions; and would have moderate to
13 severe difficulty dealing with the usual stress encountered in a work environment and may have
14 greater difficulty with authority figures. (AR 501-02.) Dr. Lemberg observed that, while
15 plaintiff’s depression had been partially treatable with medical management in the past, plaintiff
16 had no medical coverage or funds to cover treatment. (AR 501.) Without treatment, his condition
17 was not likely to improve and may be progressively difficult to treat. With treatment, his mood
18 could partially improve. Dr. Lemberg assessed a Global Assessment of Functioning (GAF) score
19 of 50. (AR 501.) *See* Diagnostic and Statistical Manual of Mental Disorders (DSM) 34 (4th ed.
20 2000) (DSM-IV-TR) (GAF of 41 to 50 describes “serious symptoms” or “any serious impairment
21 in social, occupational, or school functioning”).⁴

22

23 ⁴ The most recent version of the DSM 16-17 (5th ed. 2013) (DSM-V) does not include a GAF rating
for assessment of mental disorders. While the Social Security Administration continues to receive and
consider GAF scores from “acceptable medical sources” as opinion evidence, a GAF score cannot alone be
used to “raise” or “lower” someone’s level of function, and, unless the reasons behind the rating and the

1 The ALJ assigned some weight to the observations and opinions of Dr. Lemberg. (AR 24.)

2 She described plaintiff's success in a number of different portions of the MSE and stated:

3 [Dr. Lemberg] noted that the claimant presented as frustrated with
4 financial stressors and the disability process. He endorsed anxiety
5 about "everything", such as lack of medical coverage, lack of
6 money, and frustration at the lack of medical treatment (despite it
7 being discussed in his medical record). On the [MSE], the claimant
8 presented as being on the verge of tears and described anger and
9 frustration toward Social Security and Labor and Industries. Dr.
10 Lemberg noted that the claimant grew more angry and irritable as
11 the interview progressed, but that this appeared to be more directed
12 at the above-named entities and not toward her. She found that his
13 attention was somewhat distractible and he was perseverative
14 regarding the government, his disability, and the limited care he has
15 received.

16 (AR 24-25.) The ALJ found these observations and the diagnoses consistent with the record as a
17 whole and with plaintiff's demonstrated functioning. (AR 25.)

18 The ALJ found Dr. Lemberg's opinion that plaintiff would have difficulty with detailed
19 and complex tasks due to his memory and some occasional difficulty adapting to new
20 environments inconsistent with the record as a whole. (*Id.*) She found his reports of pervasive
21 anger and frustration not borne out by treatment notes from other clinicians, who noted polite
22 and/or cooperative presentation, and inconsistent with plaintiff's self-reports of no psychological
23 issues or severe depression. The ALJ gave these portions of the opinion little weight. She found
24 the GAF score inconsistent with the record as a whole and with plaintiff's demonstrated
25 functioning, and gave it no weight.

26 Non-examining State agency physicians Drs. John Gilbert and Jan Lewis, in October 2013
27 and January 2014 respectively, found plaintiff's mental impairments severe. (AR 72-74, 103-04.)
28 While assessing mild limitations in activities of daily living and no episodes of decompensation,

29 applicable time period are clearly explained, it does not provide a reliable longitudinal picture of the
30 claimant's mental functioning for a disability analysis. Administrative Message 13066 ("AM-13066").

1 Drs. Gilbert and Lewis assessed moderate limitations in the ability to maintain concentration,
2 persistence, and pace and in social functioning. (*Id.* and AR 77-79, 108-09.) They opined plaintiff
3 could perform simple, repetitive tasks and more complicated tasks to which he was accustomed,
4 but was not capable of complex problem solving, and that his interaction with the general public
5 should be limited to brief and superficial and he should not work in situations where his success
6 depends upon political skills with interactions with coworkers and supervisors, but he was capable
7 of getting along sufficiently to accomplish simple repetitive work tasks. (AR 72-74, 77-79, 103-
8 04, 108-09.)

9 The ALJ gave little weight to the opinions of Drs. Gilbert and Lewis. (AR 25.) She
10 referenced her earlier finding of no more than mild functional restrictions, and found the “evidence
11 received at the hearing level shows the claimant’s depression is not as severe as alleged.” (*Id.*)

12 The Court finds the ALJ’s consideration of the medical opinion evidence insufficient.
13 While the Commissioner describes the opinions of Dr. Lemberg as contradicted, several of her
14 opinions are consistent with those of the State agency physicians. At the least, all of the
15 physicians’ opinions support a finding of severe mental impairments at step two and some degree
16 of limitation in relation to task complexity and working with the public. The ALJ did not explain
17 why the record as a whole was inconsistent with Dr. Lemberg’s opinions on detailed and complex
18 tasks and occasional difficulty with adaptation or, with the opinions of Drs. Gilbert and Lewis,
19 what hearing level evidence shows plaintiff’s depression was not as severe as alleged. “As a
20 reviewing court, we are not deprived of our faculties for drawing specific and legitimate inferences
21 from the ALJ’s opinion.” *Magallanes*, 881 F.2d at 755. However, a review of the ALJ’s decision
22 does not allow for an inference as to the evidence relied upon. The ALJ, as such, also erred in
23 considering the medical opinions addressing plaintiff’s mental impairments.

Harmful Error

Plaintiff avers harmful error in the failure to include the limitations opined by Drs. Gilbert, Lewis, and Lemberg in the RFC and corresponding hypothetical to the VE. For example, while Drs. Gilbert and Lewis opined he should have no more than superficial contact with the public and Dr. Lemberg opined he would have some difficulty interacting with the public, the VE testified all three jobs identified by the ALJ at step five involve working with the public. (AR 61.) Plaintiff also contrasts Dr. Lemberg's opinions of limitations in interpersonal interactions, productivity, and usual workplace stress, with the VE's testimony no more than one absence a month would be tolerated. (AR 62.) The Commissioner does not directly respond to these arguments.

This matter should be remanded for further administrative proceedings. The ALJ erred in assessing the medical evidence and opinions associated with plaintiff's mental impairments, and did not include any restrictions associated with plaintiff's mental functioning in the RFC. Because it cannot be said that the ALJ's errors were inconsequential to the ultimate nondisability determination, they may not be deemed harmless. *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). The ALJ should, on remand, reconsider the medical evidence associated with plaintiff's mental functioning beginning at step two.

CONCLUSION

For the reasons set forth above, this matter is REMANDED for further administrative proceedings.

DATED this 6th day of June, 2017.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge

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